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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE, *Petitioner*,

vs.

HONORABLE JAMES F. BATTIN, United States District Judge for the District of Montana, Billings Division, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION OF CALIFORNIA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The undersigned move for leave to file the attached brief on behalf of the California Trial Lawyers Associ-

ation in support of Petitioner. In support of their motion, applicants state:

The undersigned constitute the Amicus Curiae Committee of the California Trial Lawyers Association, an organization of approximately 4,000 members, and file this motion on behalf of the Association.

The Association has a keen interest in this case because its purposes are to protect, preserve, and promote the rights of consumers and the public in the fields of consumer rights, environmental law, products liability, and personal injury in general, and to protect and preserve the jury system espoused by the Seventh Amendment in particular, a right which its members regard as the primary constitutional safeguard ensuring justice to all and protecting the public against abuse of highly concentrated economic power so typical of our present society.

Our study of the papers filed with this Court, and those heretofore filed below, has convinced us that certain matters have not been and are not likely to be presented to this Court by the parties which are of crucial importance for its consideration. For example, there has been little or no discussion of the role of civil juries, both as triers of fact and as definers of community standards in civil litigation, particularly in defamation and personal injury actions. Likewise, there has been little or no attention paid to the substantive implications in the reduction in size of civil juries by 50%. Nor has available empirical data been discussed by the parties.

Consent to the filing of the attached brief has been obtained from Petitioner; consent of Respondent was requested but refused.

Accordingly, we request leave to file the attached brief.

November 22, 1972.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CALIFORNIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

The nature of the interest of amicus curiae is stated in the attached motion (see above), and is incorporated herein.

SUMMARY OF THE ARGUMENT

I.

Any proposed reform in our centuries old civil jury system should be based on sound empirical data, and on an assessment of alternative means. The civil jury was established by our ancestors as a 12 member body to

ensure that it would be representative of community values and sentiments. That characteristic is crucial to the continued functioning of the civil jury since it must determine social norms in such cases as those of alleged defamation and negligence.

II.

The tasks of each individual juror are subject to the ready exercise of his personal bias and eccentricities. The civil jury can therefore not perform its function of determining community norms unless it is in fact broadly representative. The substantial reduction in size of the civil jury presented here results in different and more eccentric verdicts that deny petitioner the substance of his Seventh Amendment rights.

ARGUMENT

I. THE 12 MEMBER CIVIL JURY WAS ESTABLISHED TO ENSURE THAT COMMUNITY RATHER THAN INDIVIDUAL STANDARDS WILL DETERMINE WHETHER AND WHEN AN INDIVIDUAL WILL SUFFER LOSS OF PROPERTY OR PERSONAL REPUTATION WITHOUT COMPENSATION.

A. Civil jury reform should follow rather than precede a careful determination of the role and value of the civil jury in our legal system and of the comparative social cost of available alternatives to resolve the problems which have led to the instant alteration of the workings of the civil jury.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court concluded that the States are not required by the due process clause of the Fourteenth Amendment to provide for a 12 member jury in all criminal cases. The same day, however, the Court also assumed the continuation

of the 12 member federal criminal jury. See *Baldwin v. New York*, 399 U.S. 66, 72 (1970). See also *Bloom v. Illinois*, 391 U.S. 194, 213 (1968) (Fortas, J., concurring). Compare *Johnson v. Louisiana*, 406 U.S. 356, 369-77 (1972) (Powell, J., concurring); *Williams v. Florida*, *supra*, 399 U.S. at 122-29 (Harlan, J., dissenting). Moreover, in *Williams* this Court expressly reserved ruling on the requirements for civil juries under the Seventh Amendment. 399 U.S. at 92 n.30. But see *Duncan v. Louisiana*, 391 U.S. 145, 155, 157 (1968).

Nevertheless, *Williams* was promptly construed as having removed all constitutional barriers to the immediate reduction in size of federal civil juries. Devitt, *The Six Man Jury in Federal Court*, 53 F.R.D. 273 (1971). By April, 1972, at least 43 district courts had altered the composition of civil juries to less than 12 members in some or all civil cases. Gibbons, *The New Minijuries: Panacea or Pandora's Box?*, 58 A.B.A.J. 594, 597 (1972).

This anticipatory, if not precipitant, action was taken in face of the express mandate of 28 U.S.C. §2072 that the Federal Rules of Civil Procedure must "preserve the right of trial by jury [1] as at common law *and* [2] as declared by the Seventh Amendment to the Constitution" (emphasis added).

Neither the Ninth Circuit below, in *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972), nor the Fifth Circuit, in *Cooley v. Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972), made any pretense of considering the relationship of the size of the common law civil jury to its assigned tasks in civil actions. Both rested their affirmance of the power of district courts to impose six

member juries on unwilling litigants on the anticipated overruling by this Court of such cases as *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899). They did so despite the fact that this Court made clear in *Williams* that changes, if any, should come from the legislative branch of government. 399 U.S. at 103.

The Ninth Circuit in *Colgrove* upheld the power of the *district court* to reduce civil juries to six members in face of 28 U.S.C. §2072 on the basis that Congress should not be understood to have prevented *this Court* from moving "in interstitial areas save in accordance with perhaps archaic common law procedures." 456 F.2d at 1380. The Fifth Circuit in *Cooley* explicitly imputed approval by this Court of the district court's action. 459 F.2d at 785.

There is no value to rehearse again the various arguments pro and con the role of civil juries. See *Cooley v. Strickland Transportation Co., supra*, 459 F.2d at 782-83 n.9, for many of the more recent commentaries. It would be obtuse, however, to ignore the current widespread concern about trial delay and the increasing cost of justice in our society. See, *e.g.*, Devitt, *supra*, 53 F.R.D. at 276-77. Nor should we be blind to the fact that the ultimate goal of some "reformers" is abolition of juries altogether. *E.g.*, Sarpy *Civil Juries, Their Decline and Eventual Fall*, 11 Loyola L. Rev. 243, 266 (1963); Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola (of Los Angeles) L. Rev. 1, 31-32 (1972) (advocating reduction in jury size as a "stopgap" measure).

Given the current climate of academic opinion, it is appropriate to recall that change is not necessarily synon-

ymous with reform, and that, with respect to Seventh Amendment rights, proposed curtailments "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The value of the role of the civil jury in our society must, indeed, be assessed apart from any need to reduce the volume of civil litigation concerning the automobile or to eliminate trial delay generally. The true social cost of civil juries cannot, in any event, be determined without also considering the comparative cost of other alternatives. Thus Professor Harry Kalven reports that an additional 1.6 judges would effect the same decrease in delay as would the elimination of all civil juries in New York City; that the same would be true of a reduction of two weeks in each judge's vacation; that split trials would be at least one-half as effective; and that New Jersey jury trials are already as speedy as New York trials would be without juries. Kalven, *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1057-61 (1964). See also Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 Harv. L. Rev. 1606 (1963). In this connection it must be noted that the primary cost of juries in the federal system is not a function of their size, but of the lack of their effective use. For the fiscal year of 1971, 45.8% of the total cost of petit juries resulted from jurors who never served. The dollar cost of this waste was $6,369,000. That there is considerable room for reform is indicated by the fact that the rate of nonuse varied, from district to district, between the extremes of 17.9% to 78.7%. The estimated savings from the use of 6 member juries in all civil cases, in contrast,

would have been $1,799,600, or only 15% of the total petit jury cost. Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, *Juror Utilization in the United States Courts* pp. A-2, B-1, D-5 (August 13, 1971).

Delay per se, therefore, should not be considered "a sufficient reason for altering the jury apart from consideration of the quality of the jury as an adjudicator." Kalven, *supra*, 50 Va. L. Rev. at 1061. The jury has been retained despite the fact that "to some extent we sacrifice efficiency, expedition, and low cost." *Bloom v. Illinois, supra*, 391 U.S. at 209 (criminal case).

B. The size of the common law civil jury was dictated by the need to ensure broad community representation to avoid the injustice which results from the verdicts of smaller bodies.

The historical record is silent on the precise composition of the jury intended by the Seventh Amendment. It is nevertheless abundantly clear that the civil jury was highly prized by our Founders. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966).

In *Williams*, this Court concluded that the size of the common law jury was "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" 399 U.S. at 102. After-the-fact explanations for the precise number of 12 jurors have indeed sometimes been mystical; and it may well have been accidental that 12 rather than 10 or 11 or 14 or 15 members were ultimately selected. But there is no basis in history to conclude that it was accidental that

the final choice was not four or six or eight, rather than 12. The ultimate choice was calculated to balance the need for broad community representation with the need for a functioning deliberative body. Wells, *The Origin of the Petty Jury*, 27 Law Q. Rev. 347, 356-57 (1911). Because of "its intrinsic fairness[, the jury came] . . . to be regarded as the one regular common-law mode of trial always to be had when no other was fixed." Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 249, 259 (1892). Indeed, jury trial became synonymous with "the common law of the land." *Ibid.* n.3. There is no mystery in the fact that "what was wanted was a number that was large enough to create a formidable body of opinion in favor of the side that won." Devlin, TRIAL BY JURY 8 (1958). Here, as elsewhere, the question was decided by our ancestors on the basis of practical experience. See Holmes, THE COMMON LAW 1 (1881).

C. The community nature of the 12 member civil jury is particularly central to its special function in setting legal standards with regard to what is defamatory and what constitutes due care.

Williams identified the essential function of the criminal jury secured by the Sixth Amendment to be protection of the accused from official oppression. 399 U.S. at 100; see also *Bloom v. Illinois, supra*, 391 U.S. at 202; *Duncan v. Louisiana, supra*, 391 U.S. at 156. Finding no such function for civil juries, the Fifth Circuit in *Cooley* concluded "it would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury." 459 F.2d at 781.

The *Cooley* Court lost sight of a fundamental difference, however, in the accepted functions of criminal and civil juries. Criminal juries are not authorized to decide legal questions. *Sparf and Hansen v. United States,* 156 U.S. 51 (1895). But see Scheflin, *Jury Nullification: The Right To Say No,* 45 So. Calif. L. Rev. 168 (1972); Van Dyke, *The Jury as a Political Institution,* 16 Cath. Lawyer 224 (1970). Civil juries, in contrast, are not only authorized but required to define the social standards with respect to what is defamatory and what is due care. Kalven, *supra,* 50 Va. L. Rev. at 1071-72; James, *Functions of Judge and Jury in Negligence Cases,* 58 Yale L. J. 667, 676-79 (1949). As recognized by this Court almost a century ago, wholly apart from the fact determination

> . . . one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; those sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. . . .

Railroad Company v. Stout, 17 Wall. 657, 663-64 (1874). "Moreover, when it comes to a calculation of damages

. . . the estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society." Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 Harv. L. Rev. 1281, 1287 (1952). Our civil jury, then is *the* expert tribunal "for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages." Kalven, *supra,* 50 Va. L. Rev. at 1058.

The civil jury can perform its assigned tasks, however, only if it is truly representative, for "one juror may be a tightfisted penny-pincher, [while] another freely spends money so long as it is not his own." Hogan, *Some Thoughts on Juries in Civil Cases,* 50 A.B.A.J. 752, 753 (1964). The outstanding virtue of the civil jury according to almost all trial judges surveyed by Professor Maurice Rosenberg was its representative character. *With Love in Their Hearts but Reform on Their Minds: How Trial Judges View the Civil Jury,* 4 Colum. J. of L. & Social Prob. 178, 185 (1968). (Of those surveyed, only 40% felt the jury should be reduced in size, and then only because of savings in time and costs. *Id.* at 192.)

It is not surprising, therefore, that both sides in *Colgrove* (456 F.2d at 1380) and in *Cooley* (459 F.2d at 780) objected to the reduction of the size of the jury from 12 to six members.

II. REDUCTION IN THE NUMBER OF JURORS DEFEATS THE PRIMARY FUNCTION OF CIVIL JURIES, EFFECTS SUBSTANTIAL DIFFERENCES IN INDIVIDUAL VERDICTS, AND DENIES LITIGANTS THE SUBSTANCE OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

A. The tasks performed by each juror are subtle, complex, and vulnerable to the exercise of personal bias and eccentricity.

The underlying premise of any trial is that reasonable men and women may differ in their perceptions of the disputed facts or in their conceptions of the basic issues at stake. Otherwise the parties could settle their differences without the aid of a neutral fact finder, whether it is a judge or jury. Moreover, if everyone evaluated evidence identically, there would be no need for more than a single fact finder; each additional individual's perceptions and conceptions would be cumulative rather than potentially disparate in nature. We know, however, that there is a wide spectrum in individual ability to perceive accurately, recall accurately, and evaluate rationally what has been remembered. Two-thirds of all criminal juries, for example, disagree on the first ballot. Kalven & Zeisel, THE AMERICAN JURY 487 (1966). While there is no readily available data for civil juries, a similar rate of disagreement seems likely since jurors, unlike judges, do not perceive a substantial difference in the burden of persuasion in criminal as compared to civil trials. Simon & Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 Law & Soc. Rev. 319 (1971).

Ultimately, the jury must decide the simple question: What happened? Its task is much like that of the historian. Weinstein, *Some Difficulties in Devising Rules for*

Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223, 229 (1966); see also *In re Fried,* 161 F.2d 453, 462 n.21 (2d Cir. 1947). Unlike the historian, however, the jury must decide immediately, and without qualifications. Its verdict is the result of the collective integration of several levels of perception, memory and deliberation.

What happens in the courtroom, of course, is nothing remotely like the actual events which the jury is asked to reconstruct. The jurors must depend largely on the testimony of witnesses as to their memories of what they perceived in the past. Each juror, in short, must determine to his individual satisfaction: (1) How accurate was each witness' original perception? (2) How accurate is his present memory of that perception, if he is in fact attempting to tell the truth? and (3) How much weight should I give his testimony, given the probable nature of his original perception and his personal motivations when on the stand?

While in the juryroom, the jurors must in turn rely on their own perceptions of what transpired in the courtroom as well as their memories of those perceptions (perhaps days or weeks later). Finally, each juror must make sense of these different levels of perception and memory to participate meaningfully in the jury's deliberative process. At each stage of this complicated process (highly simplified here) each juror necessarily brings to bear his or her personal experiences, biases, and quirks.

The greater the number of jurors, therefore, consistent with a rational, deliberative process, the less influence will these individual threats to a just determination have

on the ultimate verdict. "One man cannot differ with his own judgment and any less than twelve men will reduce the probability of differences to be discussed. A fundamental tenet of the jury tradition, then, lies in its assumption that controverted factual issues are best resolved through reasoned discussion and debate." Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. Chi. L. Rev. 386, 388 (1954).

B. Reduction in the size of civil juries results in different verdicts in a substantial percentage of cases since the jury becomes less representative of the community and its values; individual verdicts, as a consequence, are subject to greater deviations from community norms.

No individual 12 member jury can be expected to be fully representative of all competing community values. *Williams v. Florida, supra,* 399 U.S. at 102. It does not follow from that fact, however, that a six member jury can represent community values equally well. A six member criminal jury will convict and acquit different defendants. Zeisel, *And Then There Were None: The Diminution of The Federal Jury,* 38 U. Chi. L. Rev. 710, 721 (1971); Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida,* 22 Case West. L. Rev. 529 (1971).

Similar results follow from the reduction in size of civil juries. A 10 percent minority in the community, for example, will be represented (before challenge) on 72 of every 100 twelve member juries, but on only 47 of every 100 six member juries. Zeisel, *supra,* 38 U. Chi. L. Rev. at 716. Moreover, a six member jury will reflect a standard deviation from community norms which is 42%

greater than that of a 12 member jury. *Id.* at 717-18. Stated another way, six member juries will inevitably render far more eccentric verdicts than will 12 member juries.

This Court concluded in *Williams* that the reduction of criminal juries from 12 to six members should not affect its function to protect an accused from governmental oppression. 399 U.S. at 100-01. In reaching this conclusion, however, it relied only on a "few experiments . . . in the civil area." *Id.* at 101-02.

Of the six sources cited (399 U.S. at 101 n.48), two rely essentially on the lack of evidence that six member juries will not function as well as 12 member juries. Wiehl, *The Six Man Jury,* 4 Gonzaga L. Rev. 35, 39 (1968); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment,* 51 Geo. L. J. 120, 129 (1962). These authors merely shifted the constitutional burden of proof to those advocating retention of juries as constituted for centuries. Two other reports concern the same Massachusetts experiment in which the actual choice presented was between a speedy determination by a six member jury or a long delayed determination by a 12 member jury. Cronin, *Six-Member Juries in District Courts,* 2 Bost. B. J. No. 4, p. 27, at 29 (1958); see also *Six-Member Juries Tried in Massachusetts District Court,* 42 J. Am. Jud. Soc. 136 (1958). This choice, of course, presents quite different issues than are faced here. The fifth source reported on what was apparently a single trial, which is hardly evidence for anything other than the fact that it happened. *New Jersey Experiments with Six-Man Jury,* Bull. of the Section of Jud. Admin. of

the ABA, May, 1966, at p. 6. The final source is itself evidence that experienced attorneys prefer 12 member juries to six member juries, even when their clients are required to pay for them. Phillips, *A Jury of Six in all Cases*, 30 Conn. B. J. 354, 355 (1956). In none of these materials is anything reported beyond individual impressions and opinions. They merely illustrate the fact that "in the absence of empirical data [concerning juries], value judgments all too readily creep in to substitute for facts." Broeder, *supra*, 21 U. Chi. L. Rev. at 424.

C. The reduction in the size of the civil jury by fifty percent effects a substantial change in its functions which denies petitioner the benefits of his rights secured by the Seventh Amendment.

The Seventh Amendment guarantees a jury trial in civil actions for damages, defamation, and recovery of property. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). Central to that right, as this Court has long held, is the determination of 12 members chosen from and representative of the community and its values. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

As demonstrated immediately above, the reduction in the size of the civil jury frustrates its constitutional function because the jury becomes less representative and subjects litigants to more verdicts which are not in accord with community norms. The function of jury size, therefore, cannot be considered merely a matter of procedure or form which is not essential to the purposes of the Seventh Amendment. Compare, *e.g.*, *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict); *Gasoline*

Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) (new trial on issue of damages alone); *Ex parte Peterson*, 253 U.S. 300 (1920) (appointment of auditor).

Civil juries do not merely determine facts; they also resolve social issues. Reduction in the size of the civil jury by 50% in the instant case denies petitioner his constitutional rights pursuant to the Seventh Amendment.

CONCLUSION

If change in the size of civil juries is to be effected in light of modern conditions, its size should be increased rather than reduced to preserve its representative character. When juries were initially established as 12 member bodies in England, and when the common law right to a civil jury was secured by our Founders by the Seventh Amendment, the communities from which juries were drawn were geographically stable, socially immobile, and low in density. Today they are drawn from communities which are characteristically mobile, incredibly diverse in experience, and of densities which are rapidly approaching the intolerable.

It is ironic that critics of the 12 member civil jury rely on the very conditions which have already substantially diluted the civil jury's representative character as justification for its further dilution, if not outright abolition. Thus viewed, the urban crisis becomes a constitutional crisis. Measured by the purposes of the Seventh Amendment, there is little difference between the bisection or abolition of the civil jury. Either so-called reform

effectively destroys the civil jury's constitutional purpose and denies civil litigants their Seventh Amendment rights.

November 22, 1972.

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